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December 15, 2010

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

By Electronic Filing

Re: Joint Petition of Accipiter  
Communications, Inc. and Qwest  
Corporation for Waiver of the Definition of  
“Study Area” of the Appendix-Glossary of  
Part 36 of the Commission’s Rules, Petition  
for Waiver of Sec. 69.3(e)(11) of the  
Commission’s Rules. CC Doc. No. 96-45

Ex Parte Notice

Dear Ms. Dortch:

On December 14, 2010 Lewis van Amerongen, Phillip Sotel, Patrick Sherrill and I, representing Accipiter Communications, Inc. met with with Brad Gillen, Legal Advisor-Wireline Policy to Commissioner Baker to discuss Accipiter’s Application for Review of the decision of the Wireline Competition Bureau denying the joint Petition of Accipiter and Qwest for waiver of the frozen study area rule.

The Accipiter representatives expressed their shock and confusion that the Bureau justified a denial order because “the Petitioners have not demonstrated that a waiver of the Commission’s rules would serve the public interest.” The record is clear on several public interest factors supporting a grant of the petition. For example, the record contains two letters from the Arizona Corporation Commission (ACC) supporting the grant of the waiver as a matter of public interest. Further, on 10 December 2010 the ACC chairman sent a letter to the FCC chairman requesting that the FCC reverse the Bureau’s decision.

During the course of the four-year long process, the Bureau had expressed only one public interest concern regarding USF support in an area where a CLEC was present. The only comment opposing the petition was also based on USF concerns. Accipiter addressed both of these concerns by offering to forgo USF for the area.

The Accipiter representatives pointed out the irony that the Bureau's order deprives consumers of non-USF based competition and leaves them victims of a CLEC's illegal monopoly scheme that was originally undone only after intervention from the U.S. Department of Justice and the Arizona Corporation Commission. The denial order serves only the interest of the CLEC in contradiction to the public interest pursuits of the DoJ and ACC.

The attached document was discussed and left with Mr. Gillen. Please address any questions to me.

Sincerely yours,

David Cosson  
Counsel to Accipiter Communications, Inc

Attachment

cc: Brad Gillen  
Melissa Newman, Qwest

## ACCIPITER TALKING POINTS

1. Accipiter Communications requests that the Commission grant its Application for Review of the Wireline Competition Bureau's unprecedented denial of its study area waiver petition. A grant will result in no USF impact and will give due respect to the finding of the Arizona Corporation Commission that the public interest will be served by the extension of Accipiter's study area to include the entire Vistancia development, thereby providing continuity of service as COLR and ETC. See attached ACC letter.
2. The sole purpose of the 1984 study area freeze was to control growth of the USF. Because there will be no USF impact, there is no federal purpose served by preventing the companies from adjusting their service area boundaries as supported and approved by the state commission for valid, articulated reasons.
3. The parties have valid reasons, clearly stated on the record, for requesting the waiver even when there is no USF impact.
4. The Bureau order is inconsistent with well-established precedents and policies and is thereby *ultra vires*.
  - a. Waivers have been granted routinely for twenty-five years in all cases where there was no adverse USF impact.
  - b. The Bureau has recognized the public interest benefit of small, high cost company participation in NECA tariffs and pools.
  - c. The Communications Act presumes ILECs will have ETC and Section 251(c) interconnection obligations
  - d. The Commission in a leading decision refrained on equitable grounds from denying a study area waiver where the parties had undertaken substantial burdens based on a reasonable expectation that they were in compliance with existing guidelines, even though there was a substantial USF impact.
  - e. The Commission has made clear that exclusive service agreements with multi-tenant properties are anti-competitive.
  - f. The Commission's separations rules operate on an ILEC's study area: there are no established rules for determining the intra-interstate allocation of investment and expenses of an ILEC that are not in a study area.
5. Additional public interest factors support grant of the Application
  - a. The regulatory uncertainty as to treatment of investment and expenses may force Accipiter to withdraw from the area.
  - b. In that event, consumers would be left with a provider with monopoly power acquired as a result of an anticompetitive agreement.
  - c. Accipiter's rural subscribers will remain highly dependent on USF support because the opportunity to reduce Accipiter's per line cost will be lost.

